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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No. 693

WHITING STOKER COMPANY,
Petitioner,

vs.

CHICAGO STOKER CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the Court of Appeals (R. 458-64) is reported at 171 F. 2d 248.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

REASONS FOR DENYING WRIT.

This was an ordinary contract action between two private persons, brought in the federal district court at Chicago for the purpose of procuring (1) a judicial determination as to the meaning of a particular phrase or portion of a sentence appearing in one clause of a private contract and (2) a judicial declaration as to whether, on the particular facts in evidence, the parties had arrived at an accord and satisfaction, under Illinois law, with reference to the asserted liability of the petitioner to purchase and pay for certain inventory. Excepting for the circumstance of diversity of citizenship, the matter would have been disposed of in the state courts, where it more properly belonged.

The case is obviously not one to commend itself to the selective jurisdiction of the highest court in the land. No grave and momentous question of vital importance to the public is involved. The quite evident import of the petition is to invite the Court to review and weigh the meaning of some 497 pages of evidence and record, and to construe some particular language in a contract, in the desperate hope that the Supreme Court might reach a different conclusion from that arrived at in the Court of Appeals. In other words, the petitioner is asking the Court to function as a forum of somewhat inferior appellate jurisdiction for the sole purpose of giving the petitioner "another hearing"—another chance to win.

There are numerous reasons why the application should be denied. A few of them are as follows:

1. The Supreme Court does not sit as merely another court of review; its power to hear cases on certiorari must be exercised sparingly.

2. Jurisdiction by certiorari was not conferred simply to give the unsuccessful litigant in the Court of Appeals "another hearing."

3. There are no "special and important reasons" for the issuance of the writ in this case.

4. No question of public importance, as distinguished from importance to the parties, is involved.

5. There is no federal question involved.

6. The petition does not set forth any grounds for granting the writ (Pet. 19).

7. The applicant is limited to the grounds specifically assigned in the petition.

8. The petition does not allege any conflict with the decisions of another circuit court of appeals on the same matter.

9. The writ is not granted because of a conflict in decisions of the same Court of Appeals.

10. The Court will not take jurisdiction for the purpose of re-examining the correctness of the result below.

11. Neither will the Court take jurisdiction for the purpose of construing a particular contract or a particular set of words.

12. The writ will not issue to enable the Court to review the evidence, draw inferences from the evidence or discuss particular facts.

13. The Supreme Court will not concern itself with the propriety of the application of settled principles of general law to a specialized set of facts peculiar to an individual case.

14. With respect to matters of general law, the Court will regard itself as bound by the decisions of the highest court of the state in which the contract had its origin.

15. The petition does not comply with the rules of this Court.

STATEMENT.

On September 2, 1944 the petitioner (plaintiff-buyer) entered into a contract at Chicago, Illinois with the respondent (defendant-seller) which provided, in part, as follows:

"B. The Buyer agrees:

* * *

2. * * * to purchase and pay for within one year from date hereof all of that portion of the remainder of said stock of parts which can reasonably be utilized by the Buyer * * *."

The Court of Appeals, reversing the District Court, held (Op., R. 460) that the plain, simple and direct language quoted means exactly what it plainly says and there is nothing ambiguous about the contract provision mentioned. The District Court, under the guise of "construction", had assumed to rewrite the contract, interpolating its own words, adding a wholly new limitation and completely changing the meaning of the instrument, to make it read as follows (R. 437):

"That the plaintiff is to purchase from the defendant, and is to pay for, all that portion of the remainder of stock of stoker parts and sub-assemblies which can reasonably be utilized by the plaintiff *within a period of one year from the date of said contract.*" (Emphasis added.)

Having thus rewritten Paragraph B-2 of the contract, it then became necessary for the District Judge to rewrite, transpose and add some words to Paragraph B-4, as follows (R. 437):

"That the plaintiff is to refrain from manufacturing or purchasing elsewhere any such stoker parts or sub-assemblies until the plaintiff has completely exhausted all of the said stoker parts and sub-assem-

> blies belonging to the defendant which can be reasonably utilized by the plaintiff *within one year from the date of the said contract.*" (Emphasis added.)

It will therefore be seen that it was the District Court, rather than the Court of Appeals as stated by the petitioner (Pet. 7, 11, 19; Br.. 27, 28, 29), which added words to the contract.

Although the petitioner was not obligated to purchase and pay for the entire remainder of reasonably usable parts until the last day of the first year, the agreement contemplated that the petitioner was to appropriate and pay for such parts, less than the whole, as might be needed from day to day *during* the first year for its manufacturing operations and repair services, accounting monthly for all such parts as had been used for such purposes during the preceding month (Contract, Pars. A-2, B-2, B-4, B-10, B-11 and B-8; R. 13, 14, 15, 17, 16). The petitioner did use such parts during the first twelve months and purported to make monthly accountings therefor. The monthly accountings were inaccurate, however, and the respondent repeatedly protested that the petitioner was using more parts than it was accounting for (R. 272; Dft. Ex. 30, 32, 33, R. 423, 424, 425). The petitioner's auditors, Eisner & Lubin, then attempted to reconcile the petitioner's records of physical inventory and parts used with those of the respondent (R. 156, 267, 268). The records of the respondent were found to be correct (R. 272). The petitioner then sent (Pl. Ex. 12, R. 352) the respondent an "additional check" in the amount of $6,533.75 (Pl. Ex. 12A, R. 354), "in accordance with the reconcilement and physical inventory taken by Eisner & Lubin" together with voucher attached (Pl. Ex. 12B, R. 355), in express payment of the following 4 specific items (R. 355, 267, 268, 222, 223, 184, 165):

1.	Balance due on account of completed stokers actually used to and including August 31, 1945	$ 180.61
2.	Balance due on account of emoluments to and including August 31, 1945	.84
3.	Balance due on account of parts actually used to and including August 31, 1945	6,299.50
4.	Balance due on account of $25,000.00 outright purchase of parts prior to August 31, 1945	52.80
	Total	$6,533.75

Enclosed was the "auditor's summary of usage of parts" (Pl. Ex. 12, R. 352)—and not the complete audit (R. 274, 268, 271) or "a copy of the detailed check-up" as stated by petitioner (Pet. 12). The auditors made no effort to deal with the petitioner's obligation "to purchase and pay for" on or before September 2, 1945 the entire "reasonably usable remainder of said stock of parts" nor to resolve the legal question allegedly inherent therein; they confined their audit to the 4 items mentioned (R. 268, 222, 223, 226). The $6,533.75 check was expressly stated in the letter accompanying it to be in payment for $6,533.75 worth of stokers and parts actually used to and including August 31, 1945 and not theretofore properly accounted for, in accordance with the auditor's summary of usage of parts (R. 352, 355, 267, 268, 222, 223, 184, 165). It did not purport to be in payment or settlement of anything else.

MISSTATEMENT OF FACTS.

In a desperate and dramatic attempt to capture the attention of the Court, counsel for the petitioner have made a number of reckless statements wholly at variance with the record. We cite but a few of them, as follows:

1. That both parties had been operating under the contract on the theory that it was ambiguous (Pet. 2). This is not true. The respondent took the position from the very outset, and has consistently maintained, that the contract is plain (Dft. Ex. 17, R. 416) and unambiguous and that it clearly obligated the petitioner to *purchase and pay for* within one year the entire remaining inventory of reasonably usable parts, but did not require the petitioner to *use* such parts within one year (Pl. Ex. 11, R. 351; Dfts. Ex. 11, 13, 15, 17, R. 411-16; R. 22), as the petitioner seems to contend.

2. That the District Court made findings of fact, none of which were questioned on appeal (Pet. 16, 19, 20). This is also in error (State. of Pts., R. 439-43; Op., R. 460-64). The Court of Appeals found that there was no evidence to sustain many of the findings of fact.

3. That the Court of Appeals has reversed the trial court on a finding of fact where the evidence is admitted and conclusive (Pet. 19). The same answer obtains here.

4. That the Court of Appeals ignored the evidence heard by the trial court and held that the contract was not ambiguous (Pet. 24). The Court of Appeals did not ignore the evidence. It merely held that, the contract being unambiguous, parol evidence should not have been received to alter, vary, modify or explain its terms (Op., R. 460-61).

5. That the letter of October 16, 1945 states the results of the work of the auditors representing the parties (Pet. 15). The letter of October 16, 1945 (Pl. Ex. 13, R. 356) plainly states that it concerns an account of the respondent with the Whiting Stoker *Sales* Company, a wholly separate and distinct corporation, not a party to this suit.

6. That the check was for the disputed item of usage (Pet. 12). There was no dispute as to the item of usage at the time the check was issued. Both parties were agreed that the amount due for parts actually used up to August 31, 1945 was $6,533.75, as shown by the respondent's records and the auditors' reconciliation and summary of usage.

7. That the respondent knew that the audit was made on "the petitioner's theory"; that the audit fixed the amount due on "the petitioner's theory"; and that the petitioner sent the respondent a check for the amount which the auditors said was due "on the petitioner's theory" (Pet. 2, 31, 32, 35). This is distinctly in error if, by the vague expression "on the petitioner's theory" the petitioner means its theory as to the proper construction of Paragraph B-2 of the contract, because the audit did not attempt to deal with that subject nor determine any question of legal liability under the contract (R. 223).

8. That the check was the sum plaintiff claimed to be due upon one way of reading the contract (Pet. 31). The check had no relation to any way of reading the contract. It related only to the amount stated to be due in the auditor's report for parts actually used up to a given date.

9. That by the letter of November 2, 1945, the petitioner plainly said "here is what we owe you *under the contract* (Pet. 35-6). The letter of November 2, 1945 (Pl. Ex. 12, R. 352) said no such thing. It, and the enclosures, plainly said "here is what we owe you on account of 4 specifically mentioned items only." (See *ante.*)

10. That paragraph B-4 deals generally with *new* stokers and parts (Pet. 9). Why only with new parts? The contract does not say so.

11. That paragraph B-4 refers to the exhaustion of such inventory within the limitations in B-4, i. e., within one year (Pet. 9). This is not true. The exhaustion referred to in B-2 is by purchase. The exhaustion referred to in B-4 is by use.

12. That under the theory of either party, paragraph B-4 would have no application after the one year period (Pet. 10). This is incorrect because of paragraphs B-10 and B-11 (R. 17), obligating the petitioner to supply repair parts for stokers previously sold by respondent and to maintain harmonious relations with respondent's customers. Respondent would have a right to insist that the petitioner use only parts of respondent's manufacture, even after the first year, as long as the supply of such parts lasted.

13. That paragraph B-4 was inserted in the contract for the benefit of the Whiting Corporation (Pet. 10). It shows on its face that it was inserted for the benefit of both the respondent and the Whiting Corporation.

14. That this litigation has to do only with the inventory of parts remaining after the 25,000.00 outright purchase and has nothing to do with paragraph B-4 (Pet. 10). But paragraph B-4 is inextricably bound up with paragraph B-2.

15. That paragraph B-8, requiring a monthly accounting as to parts used in the preceding month, clearly establishes that the parts were to be purchased on a pay-as-used basis (Pet. 10, 5). This statement is only a half truth. The inventory was taken on a consignment (pay-as-used) basis for the first year only (Pars. A-2, B-2, B-4, R. 13-16). On or before the last day of the first year, the petitioner was required to purchase and pay for the entire reasonably usable balance of inventory then remaining (Par. B-2).

16. That the parts were not to be purchased until used, for the title at all times remained in the seller (Pet. 28). This was true during the first year only—another partial truth.

17. That the respondent contends that the petitioner was obligated to purchase and pay for within a period of one year all of the parts that petitioner can use in its business at any time, no matter how remote (Pet. 3, 6). Here again we have but a partial truth. The remoteness is controlled by the limited size of the small remaining inventory. If $42,700.00 worth of inventory could be reduced by $17,000.00 in the first year of operations (R. 234), although it took petitioner six months to get into full production (R. 256), the remaining $25,700.00 worth ought to be exhausted in little more than a year.

18. That the remaining inventory consists largely of junk—returned, defective, obsolete and little used parts (Pet. 11, 5, 13, 25, 32). If that be true, then the petitioner need have no concern, because under the contract it is obligated to buy only such parts as are reasonably usable.

19. That the respondent is contending that the petitioner has, in effect, bought all the reasonably usable parts in the respondent's inventory (Pet. 6). On the contrary, the respondent is contending that the petitioner has not bought all the reasonably usable parts, but is obligated to do so. Title will, of course, remain in the respondent until the petitioner completes its obligation in that regard, as ordered by the Court of Appeals.

20. That by stating "We are enclosing the auditors' summary of usage of stoker parts which also indicates the balance of inventory belonging to you at August 31, 1945", the petitioner was "tendering back" the balance of the inventory (Pet. 16). This contention is without merit. It is obvious that until the petitioner should pur-

chase the reasonably usable remainder of parts, which it was not obligated to do until September 2, 1945, title to the parts would remain in respondent. To state that the balance of the unpurchased inventory as of August 31 "belongs to you" merely states the obvious.

QUESTION PRESENTED.

The sole question involved in this case is: Should the Court bring up the record by certiorari merely for the purpose of (1) construing a particular contract and (2) reviewing the evidence, discussing particular facts and drawing inferences therefrom?

ARGUMENT.

The petition (p. 19) alleges only two reasons for allowing the writ. The first is that the Court of Appeals, by its construction of the contract, has deprived the petitioner of a valuable contract right. The same observation might be made in every contract case. For that matter, it might be said with equal force in every case tried in the lower courts, whether in contract or in tort, that the decision of the lower court deprives one of the parties of a valuable property right. The second reason advanced is that the decision of the Court of Appeals is advanced is that the decision of the Court of Appeals is contrary to the evidence. Neither reason assigned would justify the issuance of the writ.

The Supreme Court does not sit as merely another court of review. Its power to hear cases on certiorari must be exercised sparingly and only in cases of peculiar gravity. (*In Re Woods,* 143 U. S. 202, 206; *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 258.) Jurisdiction to hear cases on certiorari was not conferred merely to give the defeated party in the Court of Appeals another hearing. (*Magnum Import Co.* v. *Coty,* 262 U. S. 159, 163.) Notwithstanding the frequent pronouncements of the Court on this subject, the romantic notion that the Supreme Court sits to "do justice" in every case potentially within its jurisdiction dies hard (Mr. Justice Frankfurter, in 48 Harv. L. Rev. 238, 264).

The jurisdiction to bring up cases by certiorari from the Courts of Appeal was given for two purposes, first to secure uniformity of decision between those courts in the various circuits, and second, to bring up cases of public importance for review. (*Magnum Import Co.* v.

Coty, 262 U. S. 159, 163.) It is very important that the Court be consistent in not granting the writ except in cases of real and embarrassing conflict of opinion between the various Circuit Courts of Appeal and in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties (*Layne & Co.* v. *Western Well Works*, 261 U. S. 387, 393).

There is, of course, no grave and momentous question of vital public importance involved in the instant case, although undoubtedly it is of importance to the parties.

The Court will not concern itself with the construction of a particular contract or a particular set of words (Robertson and Kirkham, Jurisdiction of The Supreme Court of The United States, Sec. 303, p. 607; *Ruhlin* v. *N. Y. Life Ins. Co.*, 304 U. S. 203; Chief Justice Hughes, quoted in 53 Harv. L. Rev. 579, 595) nor will the Court concern itself with the propriety of the application of settled principles of general law to a specialized set of facts peculiar to an individual case. (Mr. Henry M. Hart, Jr., in 53 Harv. L. Rev. 579, 594; *In Re Woods*, 143 U. S. 202, 206.) The writ will not issue to enable the Court to review the evidence, discuss particular facts or draw inferences therefrom (*General Talking Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178; *United States* v. *Johnston*, 268 U. S. 220, 227; *Southern Power Co.* v. *N. Carolina Pub. Serv. Co.*, 263 U. S. 508; *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440), the notable exception being in cases involving the application of a federal statute, such as the Federal Employers' Liability Act, the National Labor Relations Act, etc.

The petition filed in this case is prolix, vague, wandering, redundant and replete with innuendoes. While the pages are separately designated "Petition" and "Brief",

there is really no distinction between the two. The alleged "Statement of Facts" is but an argumentative exposition of the inferences which petitioner would like to draw from the facts according to its own peculiar partisan view. Almost the entire petition and brief are devoted to an argument on the merits, as though the case were here on appeal. Only two paragraphs (Pet. 19) are devoted to any attempt to demonstrate why the writ should issue. This, according to Mr. Justice Frankfurter, is the major recurrent vice of certiorari petitions. (48 Harv. L. Rev. 236, 265.) Failure to comply with the rule would alone be a sufficient reason for dismissing the petition. (Rule 38; *Furness, Withy & Co.* v. *Yang-Tsze Ins. Assn.*, 242 U. S. 430, 434.)

We shall touch upon the merits but incidentally. While petitioner has cited some loose language from 17 C.J.S. to the effect that a contract is ambiguous if it is susceptible of more than one interpretation and the case of *Buchanan* v. *Swift*, 7 Cir., 130 F. 2d 483, to the effect that the instrument is not unambiguous unless it is capable of but one construction, the true rule, as enunciated by the Supreme (highest) Court of the State of Illinois, is that a contract is not ambiguous unless it is *reasonably* susceptible of more than one construction; that the mere possibility of a doubt is not sufficient; and that the ambiguity must be real, rather than merely capable of being asserted. (*Chicago Home for Girls* v. *Carr*, 300 Ill. 478; *Northwestern University* v. *Hamburg*, 237 Ill. 185.) This Court will regard itself as bound by the decisions of the highest court of the state in which the contract had its origin, with respect to matters of general law, including contract law. (*Erie R. Co.* v. *Tompkins*, 304 U. S. 64.) Insofar as petitioner may have cited *Buchanan* v. *Swift* for the purpose of establishing a conflict in the

decisions of the same circuit, the effort will be unavailing for the reasons that the petitioner will be confined to the grounds specifically assigned in the petition, which cannot be expanded or added to by the brief (*General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175), and in any event, a conflict in the decisions of the same Court of Appeals is not a ground for certiorari, since the later decision in point of time (the one in the instant case) is controlling. (Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, Sec. 306, p. 619). Furthermore, the alleged conflict may be merely corollary to a permissible difference of opinion in the state courts. (*Ruhlin* v. *N. Y. Life Ins. Co.*, 304 U.S. 203.)

On the question of the alleged accord and satisfaction, the Court of Appeals held (R. 462-4) that the $6,533.75 check which petitioner gave to respondent in express payment for $6,533.75 worth of parts actually used up to and including August 31, 1945, and agreed by both parties to be the correct amount due for such parts according to the respondent's records and the auditors' reconcilation of petitioner's records thereto, did not operate in payment, settlement or satisfaction of any other claims between the parties, whatsoever. The accompanying letter (R. 463) made no mention of any other claim. The evidence which the petitioner insists the Court of Appeals refused to consider in this connection and which is digested at pp. 13-15 of the petition and again at pp. 33-5 of the brief, tends merely to establish that there was another claim between the parties, to wit: the liability of the petitioner under Par. B-2 to purchase and pay for within one year the entire remaining inventory of reasonably usable parts, which liability the petitioner was contesting. The Court of Appeals held, in effect,

that mere proof of the existence of another claim or that the parties knew of the existence of such other claim, fell far short of establishing an accord and satisfaction with regard to such claim. The three cases cited by the petitioner (Br. 36-38) are not in point for the reason that the checks which were cashed or retained by the creditors in those cases were expressly offered in full settlement and satisfaction of all accounts or of a particular account which was specifically described and mentioned at the time of the offer.

Conclusion.

The petition sets forth no "special and important reasons", nor indeed any reason, why certiorari should be granted. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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